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No. 78-1403

In the Supreme Court of the United States

OCTOBER TERM, 1978

ALFRED KIRSHNER, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
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Petitioner seeks review of the decision below holding that he has no standing to challenge the constitutionality of federal income tax statutes and rulings addressed to the federal assistance to the City of New York during its recent financial difficulties, and that the statutes and rulings do not violate petitioner's right to due process and equal protection.

The pertinent facts are undisputed and may be summarized as follows: Petitioner is a pensioner of the Teachers Retirement System of the City of New York. He brought this action against the United States and the Trustees of the Teachers Retirement System in the United States District Court for the Southern District of New York attacking the purchase by the Teachers Retirement System of bonds issued by the City of New York and the Municipal Assistance Corporation

for the City of New York (MAC). MAC was created by the New York State legislature to assist New York City in obtaining financing during its recent financial difficulties. The core of petitioner's complaint is that the purchase of these bonds by the Teachers Retirement System was an extremely unfavorable investment that was made to help New York City and favored the interests of currently employed teachers to the detriment of the Teachers Retirement System and its members.

Petitioner further claimed that the Teachers Retirement System was encouraged to purchase New York City and MAC bonds as a result of an Internal Revenue Service ruling holding that such investments would not constitute "prohibited transactions" under Section 503(b) of the Internal Revenue Code of 1954 (26 U.S.C.), and that they would not jeopardize the tax-exempt status of the Teachers Retirement System under Section 401(a) of the Code. In the Act of March 19, 1976, Pub. L. No. 94-236, 90 Stat. 238, Congress made essentially the same determination for acquisitions of City or MAC bonds occurring after August 20, 1975, by the Teachers Retirement System and the other New York City pension plans. Petitioner sought a declaration that Pub. L. No. 94-236 is unconstitutional, an injunction preventing the application of this statute, and an order setting aside the Internal Revenue Service's ruling (Pet. App. A 9a).

The district court held that petitioner had no standing to challenge the tax statutes or the Internal Revenue Service ruling and further rejected his claim on the merits (Pet. App. B 19a-25a). The court of appeals agreed that petitioner had no standing to sue the federal respondents, and that his constitutional

claims against the federal respondents were without merit (Pet. App. A 1a-15a).[1]

1. The court of appeals correctly held that petitioner had no standing to sue the federal respondents in order to challenge the constitutionality of federal tax statutes and their enforcement. As the court observed, petitioner has not shown that he sustained the requisite "actual injury" as a result of the actions of the federal respondents. *Simon* v. *Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 37-39 (1976). The sole interest petitioner has in the Teachers Retirement System is the contractual right to receive pension benefits (Pet. App. A 3a). But petitioner does not allege that he failed to receive his pension benefits (Pet. App. A 3a). Whether there will be any such failure in the future is completely speculative (see Pet. App. A 16a). Petitioner has merely alleged that the challenged investments may not generate as much income as other available investments. However, he has failed to establish or even allege facts showing that his pension will not be paid at any specific time. Accord: *Withers* v. *Teachers Retirement System of the City of New York*, No. 78-6059 (2d Cir. Jan. 16, 1979).

Petitioner's standing to challenge the Teachers Retirement System's federal tax exemption is further defective because there is no substantial likelihood that the requested relief would redress his claimed injuries. *Simon* v. *Eastern Ky. Welfare Rights Org.*, *supra*, 426 U.S. at 43-46. See also *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 74-77 (1978). The relief sought from the federal

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[1]The court of appeals further held that petitioner did state a cause of action against the Teachers Retirement System under the federal securities laws (Pet. App. A 12a-15a). However, that claim is not before the Court at this time.

respondents—a declaration that Pub. L. No. 94-236 is unconstitutional, an injunction against its application, and an order setting aside similar rulings by the Internal Revenue Service—cannot redress the injury to the Teachers Retirement System's financial integrity that petitioner claims to have resulted from its purchase of City and MAC bonds. The only consequence of the award of such relief would be the loss of tax-exempt status under Section 401 of the Code, a result that could only injure the Teachers Retirement System and possibly jeopardize petitioner's pension. Moreover, the loss of tax-exempt status by the Teachers Retirement System might not even accomplish the cessation of its purchase of New York City and MAC bonds that petitioner seeks, for the Teachers Retirement System might choose to continue investing in such bonds despite the loss of its tax exemption.

Petitioner (Pet. 10-12) and the *amicus* National Education Association/New York City (Br. 21 n.*) contend that if the tax statute and the Internal Revenue Service ruling were set aside, the purchase of the City and MAC bonds could be rescinded. But neither the City of New York nor MAC is a party in this litigation. Moreover, neither the federal statute nor the rulings required the investments of which petitioner complains. If the Teachers Retirement System's investments are shown to have been wrongful, the district court's power to grant a remedy on remand as to the non-federal defendants would be the same whether or not petitioner obtains the relief he seeks against the federal respondents. The decision below therefore correctly dismissed the suit against the federal respondents.

2. Even assuming that petitioner has standing to sue the federal respondents, the courts below correctly held that his due process and equal protection claims are

without merit. Petitioner's case seems to be founded on the premise that the federal government's special tax treatment of the five New York City pension funds constituted an unconstitutional classification and discrimination. But "[n]ormally, a legislative classification [respecting tax exemption] will not be set aside if any state of facts rationally justifying it is demonstrated to or perceived by the courts." *United States* v. *Maryland Savings-Share Ins. Corp.*, 400 U.S. 4, 6 (1970). The challenged federal actions satisfy this test because they are part of an integrated federal-state program that successfully saved New York City from bankruptcy.[2] Especially in such circumstances, "[t]he latitude of discretion is notably wide in the classification of property for purposes of taxation and the granting of partial or total exemptions upon grounds of policy." *Royster Guano Co.* v. *Virginia*, 253 U.S. 412, 415 (1920).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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[2]In the debates on H.R. 11700, 94th Cong., 2nd Sess. (1976), which became Pub. L. No. 94-236, Senator Long, Chairman of the Senate Finance Committee, stated: "In other words, if this legislation is not passed, New York City will be immediately plunged into a financial crisis which we have already sought to forestall." 122 Cong. Rec. S2796 (daily ed. Mar. 4, 1976). See also the legislative findings with respect to New York City's need for financing at Section 2, New York City Seasonal Financing Act of 1975, Pub. L. No. 94-143, 89 Stat. 797 (31 U.S.C. 1501).

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